



BOARD OF VETERANS' APPEALS

FOR THE SECRETARY OF VETERANS AFFAIRS

IN THE APPEAL OF
ARTHUR L. HAIRSTON

Represented by
The American Legion

[REDACTED]
Docket No. 190713-22960

DATE: June 17, 2020

ORDER

Entitlement to nonservice-connected pension benefits is denied.

FINDING OF FACT

The Veteran's countable income has exceeded the applicable maximum annual pension rates (MAPRs) for the period on appeal.

CONCLUSION OF LAW

The criteria for entitlement to payment of nonservice-connected pension benefits based on the Veteran's countable income have not been met. 38 U.S.C. § 1521; 38 C.F.R. §§ 3.3, 3.23, 3.271, 3.272, 3.273.

REASONS AND BASES FOR FINDING AND CONCLUSION

The Veteran had active service from August 1974 to November 1976.

A July 2019 decision denied the Veteran's nonservice-connected pension claim finding that, effective January 1, 2019, his countable income exceeded the maximum annual disability pension limit. He was advised of the decision in a July

1, 2019 notification letter. On July 13, 2019, he timely appealed the decision and requested direct review of the evidence considered by the AOJ.

The Board notes that the Veteran's July 2019 VA Form 10182 also indicated that the Veteran desired direct review of a June 28, 2019 proposal to stop benefit payments effective January 1, 2015. Nevertheless, that decision was not final decision and was not appealable.

Evidence was added to the claims file during a period when new evidence was not allowed. As the Board is deciding the claim, it may not consider this evidence in its decision. 38 C.F.R. § 20.300. The Veteran may file a Supplemental Claim and submit or identify this evidence. 38 C.F.R. § 3.2501. If the evidence is new and relevant, VA will issue another decision on the claim, considering the new evidence in addition to the evidence previously considered. *Id.* Specific instructions for filing a Supplemental Claim are included with this decision.

Entitlement to nonservice-connected pension benefits

In the present case, the essential dispute is whether the Veteran's income is a bar to entitlement to VA nonservice-connected pension benefits.

A nonservice-connected (improved) disability pension is a benefit payable by VA to a veteran of a period or periods of war because of nonservice-connected disability or age. 38 U.S.C. § 1521(a); 38 C.F.R. § 3.3(a). Basic entitlement to pension exists if, among other things, the claimant's income is not in excess of the MAPR specified in 38 C.F.R. § 3.23. 38 U.S.C. § 1521; 38 C.F.R. § 3.3(a)(3). The MAPR is published in Appendix B of the VA Adjudication Procedures Manual M21-1 and is given the same force and effect as if published in VA regulations. 38 C.F.R. § 3.21. The MAPR is revised every December 1st and is applicable for the following 12-month period. Effective December 1, 2018, the MAPR for a single veteran with one dependent was \$17,724.

In determining annual income, all payments of any kind or from any source (including salary, retirement or annuity payments, or similar income, which has been waived) shall be included during the 12-month annualization period in which received, except for listed exclusions. 38 U.S.C. § 1503(a); 38 C.F.R. § 3.271(a).

Income from the Social Security Administration (SSA) is not specifically excluded under 38 C.F.R. § 3.272 as such income is included as countable income.

Additionally, annual income includes the Veteran's own annual income, and, where applicable, the annual income of a dependent spouse and, with certain exceptions, the annual income of each child of the Veteran in his custody or to whose support the Veteran is reasonably contributing. 38 C.F.R. § 3.23(d)(4).

For purposes of calculating pension benefits, total income may be reduced by amounts equal to amounts paid by a claimant for unreimbursed medical expenses that were "in excess of 5 percent of the applicable maximum annual pension rate or rates... as in effect during the 12-month annualization period in which the medical expenses were paid." 38 C.F.R. § 3.272 (g)(1)(iii). In order to be excluded from income, the medical expenses must be paid during the time period at issue, regardless of when they were incurred. In addition, they must be out-of-pocket expenses, for which no reimbursement was received, such as through an insurance company. However, the medical insurance premiums themselves, as well as the Medicare deduction, may be applied to reduce countable income.

For the purpose of determining initial entitlement or resuming payments on an award that was previously discontinued, the monthly rate of pension shall be computed by reducing the applicable maximum pension rate by the countable income on the effective date of entitlement and dividing the remainder by twelve. 38 C.F.R. § 3.273(a). VA subtracts the total amount of countable income in one year, less excluded income, from the MAPR; then, if a positive amount remains, the rest is divided by twelve to determine the monthly pension benefit. When a change in the MAPR occurs, the Board repeats the calculation with the new MAPR as the starting amount. 38 C.F.R. § 3.273(b)(1). When a change in income occurs, the MAPR will be reduced by the new annualized income effective on the date that the increased income began. 38 C.F.R. § 3.273(b)(2).

The Veteran asserts that his wife's income should not be counted as part of his "annual income." Specifically, on his VA Form 10182, the Veteran asserted that pension benefits were warranted as he has no income and his wife has "only poverty wages."

In an August 2018 statement, the Veteran requested reinstatement of his nonservice-connected pension as he was unemployed and had no income.

The Veteran filed a VA Form 21P-527EZ Application for Pension in December 2018. He reported that he was employed as a VA housekeeper from January 1, 2019 until February 9, 2018, with annual earnings of \$35,000. He reported that he had been married since July 2015 and that his wife's annual employment income was \$20,494. He reported that neither he nor his wife received any income from SSA benefits. The Veteran did not report any medical, legal, or other unreimbursed expenses.

A February 27, 2019 SSA print screen indicates that although the Veteran was entitled to SSA benefits at a rate of \$573 per month, such benefits were not paid due to "[p]risoner [s]uspension."

A June 28, 2019 SSA print screen indicates that, effective December 2018, the Veteran received \$573 in SSA benefits. It confirmed that the Veteran's wife did not receive any income from SSA benefits.

As noted above, the MAPR for a Veteran with one dependent was \$17,724. There is no dispute that the Veteran's wife had annual employment income of \$20,494. While the Veteran has characterized his wife's income as "poverty wages," by his own reports, her earnings exceed the MAPR. In the absence of any evidence of qualifying unreimbursed expenses, which would warrant a reduction in the Veteran's countable income, his wife's employment earnings alone indicate that his annual countable income exceeded the MAPR. Accordingly, the Board need not address the Veteran's SSA earnings or employment earnings.

The Board acknowledges the Veteran's assertions that including his wife's employment earnings in his countable income "places the veteran at the mercy of his wife...promotes veteran stress, veteran suicide, and veteran divorce [sic] is discriminatory and unconstitutional." *See e.g.*, July 6, 2019 statement, July 6, 2019 supplement and update and request for permission to submit a certified question to the Court, and December 3, 2019 statement. Nevertheless, pertinent regulations require the Board to include such income. 38 C.F.R. § 3.23(d)(4) (stating that annual income includes "the annual income of the Veteran's dependent spouse").

The Board also acknowledges the Veteran's assertion that he met the "corpus of estate" requirement for pension benefits and that the corpus of the estate requirement indicates that only wealthy veterans should be denied for pension benefits. *See* July 9, 2019 statement. While it is true that net worth or corpus of estate requirements found in 38 C.F.R. § 3.274 must be met to receive pension benefits, the fact that his net worth does is not a bar to pension benefits does not alleviate the additional requirement that his income also not exceed the MAPR specified in 38 C.F.R. § 3.23. 38 U.S.C. § 1521; 38 C.F.R. § 3.3(a)(3).

In this case, the law passed by Congress specifically prohibits the payment of VA pension benefits when the Veteran's countable income exceeds certain levels. As the Veteran's countable income exceeds the statutory limits, he is not entitled to the payment of pension benefits, regardless of his honorable service or any current financial difficulties. Therefore, the Veteran's claim must be denied. *Sabonis v. Brown*, 6 Vet. App. 426 (1994).



K. Maremma
Acting Veterans Law Judge
Board of Veterans' Appeals

Attorney for the Board

J. Anderson

The Board's decision in this case is binding only with respect to the instant matter decided. This decision is not precedential and does not establish VA policies or interpretations of general applicability. 38 C.F.R. § 20.1303.



BOARD OF VETERANS' APPEALS
FOR THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON, DC 20038

Date: June 17, 2020

ARTHUR HAIRSTON
521 W RACE ST
MARTINSBURG, WV 25401

Dear Appellant:

A Veterans Law Judge at the Board of Veterans' Appeals made a decision on your appeal.

If you're satisfied with the decision, you don't have to do anything.

What's in the Board decision?

Your Board decision tells you which issue(s) were decided in your appeal. It explains the evidence, laws, and regulations the Veterans Law Judge considered when making their decision and identifies any findings that are favorable to you.

If your decision letter includes a "Remand" section, this means the judge is sending one or more issues in your appeal to your local VA office to correct an error the judge identified while reviewing your case. If an issue is remanded, it hasn't been decided and it can't be appealed yet. You'll receive a decision from the local VA office after they review the issue again.

What if I disagree with the decision?

If you disagree with the judge's decision, you can continue your appeal. See the letter included after your Board decision to learn more about the decision review options available to you.

What if I have questions?

If you have any questions or would like more information, please contact your representative (if you have one) or visit va.gov/decision-reviews/get-help. To track the status of your appeal, visit va.gov/claim-or-appeal-status/.

Sincerely yours,

A handwritten signature in black ink, appearing to read "K. Osborne", is written over a horizontal line.

K. Osborne
Deputy Vice Chairman

Enclosures (2)
CC: The American Legion



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Sincerely yours,



A handwritten signature in black ink, appearing to read "K. Osborne", is written over a horizontal line.

K. Osborne
Deputy Vice Chairman

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If you disagree with VA's decision

Choose one of the following review options to continue your case. If you aren't satisfied with that review, you can try another option. Submit your request before the indicated deadline in order to receive the maximum benefit if your case is granted.

Review option	Supplemental Claim Add new and relevant evidence	Higher-Level Review Not Available Ask for a new look from a senior reviewer	Board Appeal Not Available Appeal to a Veterans Law Judge	Court Appeal Appeal to Court of Appeals for Veterans Claims
Who and what	A reviewer will determine whether the new evidence changes the decision.	Because your appeal was decided by a Veterans Law Judge, you cannot request a Higher-Level Review.	You cannot request two Board Appeals in a row.	The U.S. Court of Appeals for Veterans Claims will review the Board's decision. You can hire an attorney to represent you, or you can represent yourself.
Estimated time for decision	 About 4-5 months	Please choose a different option for your next review.	Please choose a different option for your next review.	Find more information at the Court's website: uscourts.cavc.gov
Evidence	 You must submit evidence that VA didn't have before that supports your case.			
Discuss your case with VA				
Request this option	Submit VA Form 20-0995 Decision Review Request: Supplemental Claim VA.gov/decision-reviews			File a Notice of Appeal uscourts.cavc.gov Note: A Court Appeal must be filed with the Court, not with VA.
Deadline	You have 1 year from the date on your VA decision to submit VA Form 20-0995.			You have 120 days from date on your VA decision to file a Court Appeal.
How can I get help?	A Veterans Service Organization or VA-accredited attorney or agent can represent you or provide guidance. Contact your local VA office for assistance or visit VA.gov/decision-reviews/get-help . For more information, you can call the White House Hotline 1-855-948-2311 .			

What is new and relevant evidence?

In order to request a Supplemental Claim, you must add evidence that is both new and relevant. New evidence is information that VA did not have before the last decision. Relevant evidence is information that could prove or disprove something about your case.

VA cannot accept your Supplemental Claim without new and relevant evidence. In addition to submitting the evidence yourself, you can identify evidence, like medical records, that VA should obtain.

What is the Duty to Assist?

The Duty to Assist means VA must assist you in obtaining evidence, such as medical records, that is needed to support your case. VA's Duty to Assist applied during your initial claim, and it also applies if you request a Supplemental Claim.

If you request a Higher-Level Review or Board Appeal, the Duty to Assist does not apply. However, the reviewer or judge will look at whether VA met its Duty to Assist when it applied, and if not, have VA correct that error by obtaining records or scheduling a new exam. Your review may take longer if this is needed.

What if I want to file a Court Appeal, but I'm on active duty?

If you are unable to file a Notice of Appeal due to active military service, like a combat deployment, the Court of Appeals for Veterans Claims may grant additional time to file. The 120-day deadline would start or resume 90 days after you leave active duty. Please seek guidance from a qualified representative if this may apply to you.

What if I miss the deadline?

Submitting your request on time will ensure that you receive the maximum benefit if your case is granted. Please check the deadline for each review option and submit your request before that date.

If the deadline has passed, you can either:

- Add new and relevant evidence and request a Supplemental Claim. Because the deadline has passed, the effective date for benefits will generally be tied to the date VA receives the new request, not the date VA received your initial claim. Or,
- File a motion to the Board of Veterans' Appeals.

What if I want to get a copy of the evidence used in making this decision?

Call 1-800-827-1000 or write a letter stating what you would like to obtain to the address listed on this page.

Motions to the Board

Please consider the review options available to you if you disagree with the decision. In addition to those options, there are three types of motions that you can file with the Board to address errors in the decision. Please seek guidance from a qualified representative to assist you in understanding these motions.

Motion to Vacate

You can file a motion asking the Board to vacate, or set aside, all or part of the decision because of a procedural error. Examples include if you requested a hearing but did not receive one or if your decision incorrectly identified your representative. You will need to write a letter stating how you were denied due process of law. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion to Reconsider

You can file a motion asking the Board to reconsider all or part of the decision because of an obvious error of effect or law. An example is if the Board failed to recognize a recently established presumptive condition. You will need to write a letter stating specific errors the Board made. If the decision contained more than one issue, please identify the issue or issues you want reconsidered. If you file this motion within 120 days of the date on your decision letter, you will have another 120 days from the date the Board decides the motion to appeal to the Court of Appeals for Veterans Claims.

Motion for Revision of Decision based on Clear and Unmistakable Error

Your decision becomes final after 120 days. Under certain limited conditions, VA can revise a decision that has become final. You will need to send a letter to VA requesting that they revise the decision based on a Clear and Unmistakable Error (CUE). CUE is a specific and rare kind of error. To prove CUE, you must show that facts, known at the time, were not before the judge or that the judge incorrectly applied the law as it existed at the time. It must be undebatable that an error occurred and that this error changed the outcome of your case. Misinterpretation of the facts or a failure by VA to meet its Duty to Assist are not sufficient reasons to revise a decision. Please seek guidance from a qualified representative, as you can only request CUE once per decision.

Mail to:

Board of Veterans' Appeals
PO Box 27063
Washington, DC 20038

Or, fax:

1-844-678-8979